FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2049, 88-2052

# In the Supreme Court of the United States

OCTOBER TERM 1988

EMPLOYERS INSURANCE OF WAUSAU, ET AL.
*Petitioner*

v.

AVONDALE SHIPYARDS, INC., ET AL.
*Respondent*

OCCIDENTAL PETROLEUM CORPORATION, ET AL.
*Petitioners*

v.

AVONDALE SHIPYARDS, INC., ET AL.
*Respondents*

## PETITIONERS' CONSOLIDATED REPLY BRIEF TO HVIDE'S AND AVONDALE'S OPPOSITIONS TO THE PETITION FOR CERTIORARI

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**PETITIONERS' CONSOLIDATED REPLY BRIEF TO HVIDE'S AND AVONDALE'S OPPOSITIONS TO THE PETITION FOR CERTIORARI**

Pursuant to Rule 22.5, Petitioners in No. 88-2052, Occidental Petroleum Corporation and the London Underwriters, et al., submit their Reply Brief to address arguments first raised by respondents, Hvide and Avondale, in their Briefs in Opposition to the Petition for Writ of Certiorari.

**REPLY TO HVIDE**

Hvide's argument that the crew's effects did not constitute "other property" because such effects were "closely associated with the product" and the loss thereof was "incidental to the failure of the product" (p.13, Hvide Brief) has no basis in fact or law. Inasmuch as loss of seismic equipment installed on a vessel subsequent to its construction has been considered to be "other property", surely the crew's effects must be also considered "other property." *Nicor Supply Ships Associates v. General Motors*, 876 F.2d 501 (5th Cir. 1989). Moreover, the *Nicor* panel emphatically stated that the Fifth Circuit's opinions in the instant case and in *Louis Dreyfus Corporation v. 27,946 Long Tons of Corn*, 830 F.2d 1321 (5th Cir. 1987) to the effect that loss of cargo did not constitute "other property" within the meaning of *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)

"do not bind us as the law of the circuit." 876 F.2d at 506. Petitioners submit that those decisions are not only non-binding, but, in fact, erroneous.

Hvide further claims that the loss of the crew's property should not be considered "other property", because only a portion of the loss, if any, was paid by petitioners.[1] In fact, petitioners did pay a portion, although not the entire, loss of the crew's effects. However, whether, because of insurance coverage or otherwise, the loss of these effects was only partially paid by petitioners is totally irrelevant in determining whether the crew's effects constitute "other property" within the meaning of the *East River* case. As held in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 928 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 1472 (1988), the determination as to what constitutes "other property" is not based on who paid for its loss but whether the property was "the object of the contract" between the parties. Unquestionably, the crew's effects were purchased and lost by the crew and were not "the object of the contract" between petitioners and Hvide. Consequently, they constitute "other property" within the meaning of *East River*.

## REPLY TO AVONDALE

Avondale raises two new issues in its opposition brief: First, Avondale asserts that:

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[1]Because the case was bifurcated, there has been no trial on the damage issues yet. Therefore, no evidence has been introduced regarding the amount of loss or payment thereof.

> ...this is not a case where the remedy of 'repair or replacement' fails because the manufacturer refused to make repairs, or made repeated unsuccessful repair attempts. Rather, until the time the tug sank, repairs were possible and there is no evidence that repairs would have been unsuccessful (p. 14, Avondale Brief).

Second, Avondale suggests that the Uniform Commercial Code (UCC) is not necessarily applicable to a vessel construction contract (p. 12, footnote 5, Avondale Brief).

Avondale's argument that there was no refusal to repair totally ignores the fact that it was notified, prior to the sinking, of the problems encountered by the vessel and sent a representative to investigate the situation (see Telex, attached hereto as Tab "A" for the convenience of the Court). However, rather than providing expert advice and assistance prior to the sinking, which, as the expert ship builder it would have been in a position to render, Avondale disavowed any responsibility under the guarantee deficiency clause. Instead, it merely agreed to assist in expediting "materials for repairs."

It is, indeed, ironic that Avondale, which disavowed any responsibility for repairs under the guarantee deficiency clause, now invokes the very same guarantee deficiency clause to shield itself from liability for its breach of warranty to deliver a seaworthy vessel.

Avondale's further attempt to negate the applicability of the Uniform Commercial Code (UCC) to a vessel construction contract flies in the face of *East River Steamship Corp. v. Transamerica Delaval, Inc., supra,* which squarely held that a vessel construction contract is a sales contract to which the UCC applies. 476 U.S. at 872.

## CONCLUSION

The oppositions filed by Hvide and Avondale, rather than militating against the granting of the writ, demonstrate the need for granting it so as to resolve the uncertainties regarding the applicability of *East River* to contracts for professional services and the uncertainties regarding the definition of "other property" within the meaning of *East River*, and finally, to ensure uniform application of the UCC to vessel construction contracts. For these reasons and those stated in the Petition for a Writ of Certiorari, the oppositions filed by Hvide and Avondale should be denied and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of September, 1989, served two copies of the foregoing upon counsel of record for all parties to these consolidated proceedings by mailing same by United States mail, properly addressed, and first class postage prepaid.

JAMES B. KEMP JR.

POOR QUALITY ORIGINAL

BEST AVAILABLE COPY

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C8-7772 #1/B
#1 #1/B

SEPTEMBER 16, 1981
ASI REF 8091621-13

SUWANNEE RIVER FINANCE, INC.
ATTN ADM. T. SHEPARD, JR.

CC BY WIRE:
HVIDE SHIPPING, INC.
ATTN MR. B. SOWREY




ASI JOB CB-777

RE YOUR TELEX 9-15-81 DAMAGE INCURRED OXY PRODUCER PRESENTLY UNDERGOING SURVEY AND REPAIRS SAN MIGUEL, AZORES. THE DAMAGES SUSTAINED ARE CONSIDERED THE RESULT OF HEAVY WEATHER AND NOT COVERED BY THE BUILDER'S GUARANTEE UNDER THE CONSTRUCTION CONTRACT. AS YOU HAVE NOTED, WE HAVE SENT OUR REPRESENTATIVE TO THE VESSEL. OUR PARTICIPATION IN THIS SURVEY AND EFFORTS ON OUR PART TO EXPEDITE MATERIALS FOR REPAIRS IS NOT TO BE CONSTRUED AS ANY ACKNOWLEDGEMENT OF RESPONSIBILITY UNDER THE CONTRACT. FURTHER, WITH THE AVAILABILITY OF BUMPER MATERIALS SUWANNEE MAY BE ABLE TO MAKE PERMANENT REPAIRS. WE WILL CONTINUE TO ASSIST SO THAT REPAIRS CAN BE ACCOMPLISHED IN THE SHORTEST POSSIBLE TIME.

R. P. MERIC, JR.
AVONDALE SHIPYARDS INC

ORIGINTL WSH

ACTION DFG NLN

TIME=16:45:57 DATE=09/16/81

ASI-050759